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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 500

FENIX and SCISSON, INC., a Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 12, 1966, rehearing denied, June 15, 1966.

CITATION TO OPINION BELOW

The judgment on the verdict of the District Court, unreported officially, is set forth at page 26 of the record filed herewith. The opinion of the Court of Appeals for the Tenth Circuit, printed in Appendix B-1 hereto, *infra*, page A8, is reported in 360 F. 2d 260.

JURISDICTION

The judgment of the Court of Appeals was dated and entered May 12, 1966, Appendix B-2, page A26, *infra*. Petitioner's timely petition for rehearing was denied on June 15, 1966, Appendix B-3, page A27, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1). The jurisdiction of the District Court was based on 28 U.S.C., Section 1346 (a)(1), as an action for the recovery of Federal Income Taxes (R. page 2).

QUESTIONS PRESENTED

1. Whether the Court of Appeals denied to the petitioner the right to a trial by jury granted by 28 U.S.C., Section 2402, when the Court of Appeals determined that the District Court should be reversed as a matter of law on the record in its approval of the jury's finding that Oronogo Mutual Mining Company was engaged in a trade or business at the time that it was acquired by petitioner, the District Court having specifically found that there was a conflict in the evidence on such issue and the jury having found in favor of the petitioner in answer to interrogatories submitted to it.

2. Whether the opinion of the Court of Appeals is directly contrary to the decisions of this Court by reason of the fact that despite a record containing substantial evidence sustaining the verdict of the jury, the Court of Appeals pre-empted the fact finding task of the jury and substituted its own judgment for that of the jury.

3. Whether a motion for a directed verdict stated to be "on each issue in this case", but containing only one specific ground therefor, *i.e.*, "the failure to carry on a trade or business is conclusively established by the filing of the Articles of Dissolution," can serve as the basis for a later

motion for judgment notwithstanding the verdict, where the subsequent motion was predicated on the basis that Oronogo Mutual Mining Company did not continue to carry on the same trade or business after its acquisition by the petitioner, when Rule 50 of the Federal Rules of Civil Procedure provides that a motion for a directed verdict must specifically state the grounds therefor, and that a motion for judgment notwithstanding the verdict must be based upon the same grounds contained in the motion for directed verdict.

4. Whether a corporation with a net worth of $75,000.00 at the time that its stock was acquired by petitioner, which owned mining equipment at the same time of a substantial quantity, which corporation third parties were interested in acquiring as a part of a plan to resume mining production, and which corporation, like more than half of the mining companies in the area in which it operated, stood ready to resume extractive operations whenever the market price of zinc justified the production and which corporation at the time of its acquisition by petitioner maintained an office, plant and warehouse with two employees and had taken all of the steps necessary to maintain itself as a viable corporate entity, may be determined as a matter of law, not to have been engaged in a trade or business at the time it was acquired by petitioner so that acquisition of the stock did not entitle the petitioner to loss carryovers previously incurred by the acquired corporation under Section 382 (a) of the Internal Revenue Code of 1954, 26 U.S.C., Section 382 (a).

5. Whether the regulations of the Commission of Internal Revenue correctly reflect the intent of Congress contained in Section 382 of the Internal Revenue Code of 1954, in requiring that the acquired corporation be actively

engaged in a trade or business at the time of the purchase of its stock by a corporation such as petitioner, before the acquiring corporation may take advantage of loss carryovers previously incurred by the acquired corporation.

6. Whether or not the Court of Appeals was correct in ruling that the Oronogo Mutual Mining Company never resumed any business after its acquisition by the petitioner despite the fact that the substantial elements of its trade or business mentioned in question numbered 4 above remained unchanged from October 14, 1955 to October 31, 1956, during which period Oronogo realized receipts from sales and receipts from rentals and incurred expenses for wages and salaries, telephone, telegraph, insurance, depreciation, taxes and licenses and filed its income tax returns, franchise tax returns, and other returns necessary to doing business.

STATUTES INVOLVED

The statutory provisions involved are Section 382 of the Internal Revenue Code of 1954, 26 U.S.C., Section 382; 28 U.S.C., Section 2402; Federal Rules of Civil Procedure, Rule 50 (a) (b). Such statutes and rule are printed in Appendix A, *infra*, pages A1 to A4, inclusive.

The regulation involved is Reg. Section 1.382 (a)-1 (h) 6, 26 CFR, Section 1.382 (a)-1 (h) 6. Such regulation is printed in Appendix A, *infra*, pages A4 to A7, inclusive.

STATEMENT

Petitioner commenced this action in the United States District Court for the Northern District of Oklahoma under 28 U.S.C., Sec. 1346 (a) (1) for the recovery of Federal income taxes for its taxable year ended October 31, 1958, in the amount of $40,618.90. The case was tried be-

fore a jury in Tulsa, Oklahoma, May 26-May 30, 1964. At the close of the evidence, both parties moved for a directed verdict on each issue in the case, which motions were denied (R. 262-264). The case was submitted to the jury on interrogatories. It answered the interrogatories in favor of petitioner and returned its general verdict in accordance therewith (R. 20-22). On June 8, 1964, petitioner filed its Motion for Entry of Judgment and respondent filed its Motion for Judgment Notwithstanding the Verdict (R. 22-23). On June 22, 1964, respondent filed an Amended Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, For a New Trial (R. 23-24). The trial court entered its Order Overruling Defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, For a New Trial and its Judgment in favor of Petitioner on October 28, 1964 (R. 25-26).

Fenix and Scisson, Inc., the petitioner in this case, was incorporated in 1951 under the laws of the State of Oklahoma with its principal office at Tulsa, Oklahoma (Pltf. Exs. 25, 46). During the period here in issue Gilbert J. Fenix and Sidney E. Scisson were equal stockholders of the corporation and were its principal officers and directors until Fenix's death in 1963. Petitioner was engaged in heavy construction work, contract mining of underground caverns for the storage of propane and butane, and exploratory mineral activity. Fenix was an experienced mine operator in the Tri-State mining area, which area includes the Oronogo District of Southwestern Missouri (Pltf. Exs. 47, 48, 49; R. 142-146, 246).

Oronogo Mutual Mining Company (hereinafter called Oronogo) was incorporated in 1936 under the laws of the State of Missouri with its principal office at Oronogo, Jasper County, Missouri (Pltf. Ex. 26). Oronogo was or-

ganized and operated for the purpose of engaging in the mining business, owning and operating lead, zinc, coal or other mines and doing all things necessary for the carrying on of said business. On October 14, 1955, and prior thereto, all the outstanding stock of Oronogo was owned by Guy H. Waring, Georgia Waring, his wife, and their daughter, Mary Frances Fenix, the wife of Gilbert J. Fenix (R. 148). In the spring of 1955 Waring began negotiations with petitioner and with the partnership of Potter and Sims of Joplin, Missouri, looking toward the sale of the stock of Oronogo as well as certain mining leases in the Oronogo District, titles to which were held in Waring's name (Pltf. Ex. 51; R. 103, 146-148). On October 14, 1955, petitioner purchased from Waring all the outstanding stock of Oronogo. At the same time Fenix, acting in behalf of Oronogo, acquired from Waring the leases owned by Waring on the Oronogo mining properties (Pltf. Ex. 52; R. 147-148). On October 31, 1957, Oronogo was merged into petitioner (Pltf. Exs. 53, 54; R. 150-151).

The Forms 1120, U. S. Corporation Income Tax Returns, of Oronogo for the calendar years ended December 31, 1953, 1954 and 1955, and for the fiscal years ended October 31, 1956 and October 31, 1957, were duly filed with the Internal Revenue Service (Pltf. Exs. 2, 3, 4, 27, 28, 29, 30; R. 34-35, 53-54). Oronogo's income tax returns for the years ended December 31, 1953, December 31, 1954 and October 31, 1957, disclosed net operating losses in the respective amounts of $28,222.80, $10,441.73 and $320.55. These returns were accepted as filed by the Internal Revenue Service (R. 261). On its Form 1120, U. S. Corporation Income Tax Return for its taxable year ended October 31, 1958, petitioner claimed as a deduction, pursuant to Sections 332, 381(a) and 381(c)(1) of the Internal Revenue Code, 1954

(26 U.S.C., Sections 332, 381(a), and 381(c)(1)[1]), the net operating losses of Oronogo set forth above, totalling $38,985.08 (Pltf. Ex. 42 and Schedule 7 thereto; R. 140). On examination of petitioner's return for said taxable year, the Internal Revenue Service disallowed the deduction of said net operating losses, citing as its authority Sections 269[2] and 382, I.R.C. (Pltf. Ex. 43). Petitioner thereafter paid the resulting income tax deficiency, filed its claim for refund, and duly commenced this action in the court below (Pltf. Exs. 44, 45, 50; R. 11-17, 141, 145).

The facts in this case clearly show that prior to the acquisition of its stock by the petitioner on October 14, 1955, Oronogo was engaged in a trade or business. During the calendar year 1952 Oronogo realized gross income from sales of $39,691.19. It incurred costs of sales in the amount of $28,780.12 and expenses for property taxes, depreciation and other deductions in the respective amounts of $2,127.09, $23,991.00 and $10,530.11. At the close of the taxable year it had total assets of and a net worth of $116,198.03 (Pltf. Ex. 1; R. 33-34). During the calendar year 1953 Oronogo realized gross income from sales of $33,662.44. It incurred cost of sales for labor, gravel purchases, freight and royalty expenses in the total amount of $49,202.53, and for bad debts, taxes, depreciation, and other deductions in the respective amounts of $182.50, $2,777.92, $2,730.71 and $7,095.56, its expenses totalling $12,786.69 in all. At the close of the taxable year it had total assets of $73,579.86 and a net worth of $73,462.45 (Pltf. Ex. 2; R. 34). During

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1. All subsequent references herein to "Section ....., I.R.C.", are to Section ....., Internal Revenue Code of 1954, 26 U.S.C., unless otherwise stated.

2. On trial of this case, the jury decided the Section 269 issue in favor of petitioner, and this issue is not here involved (R. 20).

the calendar year 1954 Oronogo realized a gain of $3,154.00 from the sale of automotive equipment and gross income from equipment rental; sale of scrap, interest, and miscellaneous income in the respective amounts of $2,000.00, $1,057.94, $936.00 and $184.04. It incurred expenses for salaries, supplies, mine expenses, depreciation, taxes and licenses in the respective amounts of $5,848.34, $2,734.12, $600.00, $4,271.41, and $1,798.49, as well as certain other expenses, its expenses totalling $17,773.71 in all. At the close of the taxable year it had total assets and net worth of $75,275.30 (Pltf. Ex. 3; R. 35). During the calendar year 1955[3] Oronogo realized gains from the sales of equipment in the amount of $25,402.61 and other gross receipts in the amount of $6,360.84 and incurred expenses for lease expense, salaries, supplies, mine expense and taxes in the respective amounts of $428.20, $6,253.93, $2,417.03, $550.00, and $1,113.18, as well as certain other expenses, its expenses totalling $13,278.25 in all (Pltf. Exs. 4, 27; R. 35, 53).

In October, 1955, prior to its acquisition by the petitioner, Oronogo was in the mining business (R. 68, 149). It owned an office, plant and warehouse and extensive mining equipment at Oronogo Circle near Oronogo, Missouri (R. 105, 139, 149, 161). It owned mining equipment on a coal mining property at Bates, Arkansas (Pltf. Exs. 19, 20; R. 44-45, 166). Like many other companies in the highly cyclical lead and zinc mining fields[4] of the Tri-State

3. This period includes the period from October 15, 1955, to December 31, 1955, which period was of course subsequent to the acquisition of Oronogo by the petitioner.

4. Although the ores in the southwest Missouri portion of the Tri-State mining area contain both lead and zinc, zinc is the principal product (R. 97).

District, Oronogo stood ready to resume extractive operations whenever the market price of ore justified production (R. 68, 77, 180). It was maintaining its mining equipment, renting some upon occasion and disposing of some equipment as is customary in the industry (R. 91-93, 130). Negotiations were being conducted in behalf of Oronogo with Potter and Sims, looking toward the resumption of production in the Oronogo District (R. 68, 94-95, 97-99, 103). With the equipment on hand, Oronogo was ready to resume extractive production within 60-120 days (R. 120, 128). On the leases held in Waring's name an estimated 31,400 rock tons of ore were available; an estimated 100,000 tons were available in the roadways of the Oronogo Circle Pit mine under lease to Potter and Sims (Pltf. Ex. 36; R. 82, 94-95). Milling and treating plants were available in the Tri-State area for the handling of the product (R. 81, 87). The price of zinc in October, 1955, was 13¢ per pound (Pltf. Ex. 38; R. 115). In October, 1955, Oronogo had two permanent employees (R. 52, 163, 173). Oronogo was engaged in a trade or business on October 14, 1955 (R. 180).

The facts in this case also clearly show that during the period from October 14, 1955 to October 31, 1956, Oronogo continued to carry on substantially the same trade or business as that carried on prior to the acquisition of its stock by the petitioner (R. 149, 180). During the taxable year beginning January 1, 1956, and ending October 31, 1956,[5] Oronogo realized gross income from the sale of supplies and equipment in the amount of $35,817.43 and gross income from equipment rental in the amount of $13,347.00.

5. With the permission of the Internal Revenue Service, the taxable year of Oronogo was changed from the calendar year to a fiscal year ending October 31 in order to coincide with the taxable year of the petitioner (R. 54, 166).

It incurred expenses for salaries and wages, coal mine expense, taxes and depreciation in the respective amounts of $3,791.00, $150.00, $560.09, and $7,157.71, as well as certain other expenses, its expenses totalling $14,706.48 before state income taxes (Pltf. Exs. 28, 29; R. 54, 56, 58). During the period from October 14, 1955 to October 31, 1956, Oronogo continued in the mining business. It continued to own the mining buildings and mining equipment at Oronogo Circle (Pltf. Exs. 28, 29; R. 156, 157, 178). It continued to own the coal mining equipment on the Bates, Arkansas, lease (Pltf. Exs. 19, 20, 22; R. 157). Oronogo stood ready to resume production of zinc on a favorable market; it explored the possibility of production on the Athletic mine (Pltf. Exs. 13, 14, 16; R. 42-43, 134, 149, 154, 155). It continued to maintain its mining equipment, renting some equipment and selling some as it had done before (Pltf. Exs. 5, 9, 10; R. 40-43, 152, 153). Negotiations with Potter and Sims continued, exploring the feasibility of joint venturing the Oronogo Circle if the zinc market reached 15¢ (R. 107, 115, 150-152). The ore reserves of the Waring leases now held by Fenix in behalf of Oronogo were available to the joint venture project (Pltf. Ex. 52; R. 148). The milling plants in the area remained (R. 86-87). The price of zinc from October 12, 1955 to October 31, 1956, rose insignificantly from 13¢ to 13½¢ per pound (Pltf. Ex. 38). At October 31, 1956, Oronogo had two permanent employees (R. 173). From October 14, 1955 to October 31, 1956, Oronogo continued to carry on substantially the same trade or business as that it was conducting prior to its acquisition by the petitioner.

At the close of the evidence in this case respondent moved for a directed verdict on the grounds that the filing by Oronogo of Articles of Dissolution (Def. Ex. 19) constituted conclusive evidence that Oronogo was not

carrying on a trade or business at the time its stock was acquired by petitioner (R. 262-263). This motion was overruled by the court (R. 263). The following interrogatory was submitted to the jury:

"INTERROGATORY No. 2

> Was the Oronogo Mutual Mining Company carrying on a trade or business at the time of acquisition by plaintiff and if so did the Oronogo Mutual Mining Company continue for the period of one taxable year after the taxable year in which it was acquired by the plaintiff to carry on substantially the same trade or business as that conducted by it prior to such acquisition?" (R. 20).

The jury, upon instructions by the Court, returned an affirmative answer to this interrogatory, thus deciding the issue in favor of the petitioner. On June 22, 1964, respondent filed its Amended Motion for Judgment Notwithstanding the Verdict,[6] or, in the Alternative, for a New Trial, which motion for judgment *non obstante veredicto* purporting to be in accordance with the respondent's previous Motion for a Directed Verdict, alleged:

> ". . . . All the evidence is insufficent in law to form a basis for the verdict of the jury (1) that the plaintiff's wholly owed subsidiary, Oronogo Mutual Mining Company, continued to carry on a trade or business substantially the same as that conducted before its purchase by the plaintiff on October 14, 1955, within the meaning of Section 382 (a) of the Internal Revenue Code of 1939 (sic). . . ." (R. 24).

The parties filed briefs in support of their positions (R. 32). On October 28, 1964, the trial court entered its Order Overruling Defendant's Motion for Judgment Notwith-

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6. Its original Motion for Judgment Notwithstanding the Verdict having been previously filed on June 8, 1964 (R. 22-23).

standing the Verdict, or, in the Alternative, for a New Trial, saying with respect to the issue at bar:

> "Defendant's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, is overruled and denied by the Court.
>
> "With reference to the active trade and continuing to carry on substantially the same trade propositions, the evidence presented at the trial was conflicting and, in fact, substantially to support either the conclusion urged by the plaintiff or the conclusion urged by the defendant. The jury, after complete exposure to the facts and under proper instructions by the Court, decided the controversy in favor of the plaintiff. *This decision of the jury is supported by substantial evidence* and while the Court if required in place of the jury to make this determination might have reached a different conclusion the Court cannot say that under the evidence in this case either proposition can and should be answered as a pure matter of law." (R. 25) (Emphasis supplied).

The trial court thereupon entered judgment in favor of the petitioner in the sum of $34,400.79 for the overpayment of its income taxes for its taxable year ended October 31, 1958, the further sum of $6,439.38 for the overpayment of assessed interest for said taxable year, with interest as provided by law (R. 26).

The respondent perfected its appeal to the Court of Appeals for the Tenth Circuit. After briefs were filed and oral arguments were had by both petitioner and respondent, the Court of Appeals entered its opinion and judgment on May 12, 1966, reversing the District Court, and ruling that the jury verdict finding that the Oronogo Mutual Mining Company was engaged in a trade or business at the time that its stock was acquired by the petitioner was contrary to the evidence which in its totality

led only to the conclusion that Oronogo was no longer engaged in any trade or business and that the jury verdict to the contrary must be set aside as a matter of law. The petitioner thereupon filed a timely petition for rehearing which was denied by the Court of Appeals on June 15, 1966 (Appendix B-3, *infra*, page A27).

REASONS FOR GRANTING THE WRIT

1. The question presented, number one, presents an important question of Federal law which has not been, but should be, settled by this Court. Settlement of the question by this Court is plainly in the public interest, since it is likely to be presented at almost every tax refund action where either the taxpayer or the United States requests a trial by jury. In addition, the opinion of the Court of Appeals has departed so far from the accepted and usual course of judicial proceedings involving trial by jury as to call for an exercise of this Court's power of supervision.

In the 1954 Internal Revenue Code Congress for the first time granted to the taxpayer the right to a trial by jury in an action against the United States for tax refunds. 26 U.S.C., Section 2402. The Congress was fully aware of arguments which had been previously advanced for not granting such a right to the taxpayer, but it quite consciously reversed its prior policy and granted such right (1954 US Code Cong. & Adm. News, pages 2720-2721).

Congress thus showed the ability to speak clearly on the issue of granting the right to trial by jury and to effectuate a change in the previously existing policy. It amended 28 U.S.C., Section 2402, to provide that a taxpayer, by paying an assessment and suing for a refund, may have his jury trial, whether the taxpayer sues the District Director or the United States. *Damsky* v. *Zavatt*,

289 F. 2d 46 (2nd Cir., 1961) (note particularly the dissent of Judge Clark); *United States* v. *Warren*, 235 F. Supp. 638 (W.D. North Carolina, 1964).

The reasons for granting a taxpayer the right to trial by jury in a tax refund case are as compelling as those which motivated Congress to grant the right of trial by jury in cases arising under the Federal Employers' Liability Act. Therefore, decisions arising under the FELA have validity in tax refund cases tried to juries. It is not the function of the Court to search the record for conflicting evidence in order to take the case away from the jury. It is the jury, not the Court, which is the fact finding body. *Tennant* v. *Peoria and P.U.R. Co.*, 321 US 29 (1944). The essence of the jury system is the selection of conflicting inferences and conclusions. The conclusion of the jury, whether it relates to negligence or any factual matter, cannot be ignored. Courts are not free to re-weigh the evidence and set aside jury verdicts because judges feel that other results are more reasonable. *Tennant* v. *Peoria and P.U.R. Co., supra.*

2. The question presented, number two, raises important issues for this Court for several reasons. The Court of Appeals for the Tenth Circuit, by its decision, has decided a federal question, *i.e.*, the allowance or granting of a directed verdict or judgment notwithstanding the verdict in a tax refund case tried to a jury, in a way in conflict with applicable decisions of this Court which deal with the situation where Congress has specifically provided to a litigant trial by jury. Such a ruling therefore calls for an exercise of this Court's power of supervision over that Court of Appeals and all other Courts in a similar situation.

Where other statutes have granted the right to trial by jury to litigants, this Court has explained that Certiorari was granted because of the importance of preserving for litigants their right to a trial by jury. *Wilkerson* v. *McCarthy*, 336 US 53 at 55 (1949). As this Court has pointed out, in connection with the Federal Employers' Liability Act, Congress intended to vest the power of decision in FELA cases in the jury in all but the infrequent cases where fair-minded jurors could not honestly answer where the fault lay. *Rogers* v. *Missouri Pacific Railway Company*, 352 US 500 at 510 (1957). It is submitted that Congress by 28 U.S.C., Section 2402, has vested a similar power in juries in tax refund cases. This Court is firmly committed to the viewpoint that maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence, that any curtailment of the right to trial by jury should be scrutinized with the utmost care. *Beacon Theatres* v. *Westover*, 359 US 500 (1959); *Dimick* v. *Schiedt*, 293 US 474 (1935).

Furthermore, this Court has indicated that a jury verdict must not be pre-empted unless it has no basis in fact. *Montgomery Ward & Company* v. *Duncan*, 311 US 243 (1940). From the evidence discussed in the above statement contained in this Petition for Certiorari, the petitioner submits that it cannot be stated as a matter of law that the Oronogo Mutual Mining Company was not engaged in a trade or business at the time that its stock was acquired by the petitioner. The instant case simply represents the typical situation where there is a direct conflict in the testimony, a fact which was clearly recognized by the trial judge (R. 25). With such a conflict in the record, this is a classic example of a case where reasonable men might differ with respect to the issues

and is therefore a classic example of a case which should be left to the factual determination of the jury. *Continental Ore Co., et al.* v. *Union Carbide and Carbon Corporation,* 370 US 690 (1962). In addition, the Court of Appeals was, of course, bound to view the evidence in the light most favorable to petitioner and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. *Continental Ore Co., et al.* v. *Union Carbide and Carbon Corporation, supra.* Although the Court of Appeals paid lip service to this rule, it in fact re-weighed the evidence and drew its own inferences from conflicting evidence.

The failure of this Court to grant Certiorari in the instant case will result in the preservation of a Court of Appeals opinion, which will have a most unsettling effect on jury tax litigation in all pending cases and an unsettling ancillary effect on all Federal jury litigation.

3. The question presented, number three, is of great importance to the public in general for the reason that the decision of the Court of Appeals directly flaunts the express language of Rule 50 (a) of the Federal Rules of Civil Procedure. The decision in that respect raises an issue for this Court of an important federal question under the Rules of Civil Procedure which has not been but should be settled by this Court.

The construction of the Federal Rules of Civil and Criminal Procedure and the supervision of that construction is of course an important function of this Court. *Hickman* v. *Taylor,* 329 US 495 (1947); *Upshaw* v. *United States,* 335 US 410 (1948). Deviation from the intended results of those rules should be prevented.

At the close of all of the evidence in this case in the trial court, the respondent made the following motion for a directed verdict:

> "Government makes a motion pursuant to Rule 41 (sic) for a directed verdict and dismissal of the plaintiff's complaint on each issue in this case. The government feels that the *failure to carry on a trade or business is conclusively established by the filing of the Articles of Dissolution.*" (R. 262) (Emphasis supplied).

Rule 50 (a), Federal Rules of Civil Procedure, requires that a motion for a directed verdict shall state the specific grounds therefor. See *O'Malley* v. *Cover*, 221 F. 2d 156 at 158 (8th Cir., 1955). The petitioner submits that such a motion as that above set forth does not comply with the intent of Rule 50 (a). Other Courts of Appeal have stated that motions which simply move the Court to direct the jury to return a verdict for the defendant do not comply with the Rules of Civil Procedure. *Jones Truck Lines* v. *Argo*, 237 F. 2d 649 (8th Cir., 1956). It is clear that this requirement was not haphazardly placed in the Rule. The advisory committee notes to Rule 50 state: "The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases". 28 U.S.C., Rule 50. If the Rule is not followed according to its specific language, then the conflict which the committee, and apparently this Court, thought it was resolving by way of the new rule has not been eliminated. It is obvious why the advisory committee and this Court desired to eliminate the previous conflict in Federal decisions. A moving party should have the burden of specifically showing to the opposing party and to the Court why a motion for directed verdict should be allowed. If a shotgun blast such as is

contained in the motion for directed verdict in the instant case is sufficient, why would it not be sufficient in the protracted anti-trust case or any other case? Such general motions are prejudicial to opposing counsel and to the trial court itself. The Rules of Civil Procedure have been adopted to prevent such confusion and prejudice from happening and such rules should be followed, even though the United States is a party litigant in the case.

The petitioner submits that to allow the Court of Appeals' ruling to stand on this issue will effectively result in the elimination of Rule 50 (a) from the Rules of Civil Procedure.

The question presented, number three, is also important for the reason that it involves a construction of Rule 50 (b) of the Federal Rules of Civil Procedure and is an issue which is an important question of Federal Law which has not been, but should be settled by this Court. This question involves the construction of the Federal Rules of Civil Procedure and the supervision of those rules by this Court.

Under Rule 50 (b) the party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered only in accordance with his previous motion for directed verdict. In its amended motion for judgment notwithstanding the verdict, the respondent stated as follows:

> "The grounds upon which this Motion is made are that all the evidence is insufficient in law to form a basis for the verdict of the jury that (1) *that* the plaintiff's wholly owned subsidiary, *Oronogo* Mutual Mining Company, *continued to carry on a trade or business substantially the same as that conducted before its purchase by the plaintiff on October 14, 1955,* within the meaning of Section 382 (a) of the Internal Revenue Code of 1939 (sic). . . ." (R. 24) (Emphasis supplied).

It is apparent that the respondent purported by its motion for judgment notwithstanding the verdict to change the specific ground set forth in its motion for directed verdict. The ground for respondent's motion for a directed verdict, most broadly construed, can be deemed to raise only the question of whether there was any substantial evidence to establish that Oronogo Mutual Mining Company was carrying on a trade or business on October 14, 1955. The motion for judgment notwithstanding the verdict abandoned this specific ground set forth in the motion for directed verdict and then sought to shift respondent's allegations of error to the question whether there was any substantial evidence to support the jury's findings that from October 14, 1955, to October 31, 1956, Oronogo continued to carry on substantially the same trade or business that it carried on previously. The respondent may not base its motion for judgment NOV on grounds different from those contained in the motion for directed verdict. Having failed to raise in its motion for directed verdict the sufficiency of the evidence to establish whether Oronogo continued to carry on the same business, the respondent cannot properly bring the motion for judgment NOV before an Appellate Court. *Lewis* v. *Mears*, 189 F. Supp. 503 (W.D. Pa. 1960), *affirmed* 297 F. 2d 101 (3rd Cir., 1961); 35B CJS, Federal Civil Procedure, Section 1221 at page 649.

Although the Court of Appeals purported not to pass upon the issue as to whether or not Oronogo continued to operate the same business after its acquisition by petitioner, the Court nevertheless stated "the facts clearly indicate no business was ever resumed prior to liquidation", Appendix B-1, *infra*, page A25. By inference, therefore, the Court of Appeals has given its blessing to a motion NOV, which was on completely different

grounds from the motion for directed verdict. In doing so it directly flaunted the Rules of Civil Procedure, a situation which should not be allowed to stand.

4. The question presented, number four, involves an important question of Federal law which has not been, but which should be settled by this Court. The construction of the intent of Congress contained in Section 382 of the Internal Revenue Code of 1954, 26 U.S.C., Section 382, is an important federal question yet to be determined. Settlement of the question by this Court is plainly in the public interest since it is apparent from the increasing number of Section 382 cases being reported in lower courts that there are numerous such cases now pending. The guidance of this Court in construing this important section of the Internal Revenue Code would greatly enhance the administration of the revenue laws.

The Court of Appeals has held as a matter of law that Oronogo was not engaged in a trade or business on October 14, 1955. Yet, on October 14, 1955, prior to its acquisition by petitioner, Oronogo was in the mining business (R. 68, 149).

At October 14, 1955, prior to the acquisition of its stock by petitioner, Oronogo was in the mining business (R. 68, 149). It owned mining buildings and mining equipment at Oronogo Circle and mining equipment on a coal mining property near Bates, Arkansas (R. 44-45, 105, 139, 149, 161, 166). Oronogo, like more than half the mining companies in the area, stood ready to resume extractive operations whenever the market price of zinc justified the production (R. 68, 77, 180). And it was in fact at that very time in negotiations with Potter and Sims concerning resumption of production in the Oronogo District (R. 68, 94-95, 97-99, 103). At October 14, 1955, Oronogo maintained its office, plant and warehouse at the Oronogo Circle Pit mine. It

realized gross income from sales, from rentals, and from sales of portions of its equipment (Pltf. Exs. 1, 2, 3, 4). It incurred expenses of operations for costs of sales, wages, taxes, utilities, depreciation, supplies, insurance, licenses, mining and other expenses (*Ibid.*). Oronogo had two permanent employees (R. 52, 163, 173). Oronogo filed its income tax returns, corporate franchise tax return, and other returns necessary to doing business. Its net worth was approximately $75,000.00 (Pltf. Ex. 3; R. 35). All of these facts, clearly uncontroverted, justified the jury's finding that Oronogo was carrying on an active trade or business at October 14, 1955.

In summary then, the record shows that there was not only substantial but also persuasive evidence to support the jury's finding that Oronogo was engaged in an active trade or business at October 14, 1955. It owned mining buildings and substantial amounts of mining equipment; it had not disposed of its assets. *Clarksdale Rubber Co.*, 45 T.C. No. 22 (1965) (Appeal pending). Oronogo realized income from sales, rentals, and other sources and incurred expenses of operations for salaries, wages, taxes, mining expenses, and other items. It filed its income tax and franchise tax returns. It was ready, as it had been, to resume extractive operations on mining leases in the Oronogo Mining District, to be operated as it had always done through sublease arrangements with Waring, its principal stockholder and officer. See *H. F. Ramsey Co.*, 43 T.C. 500 (1965). The Court of Appeals apparently ignored the previously cited Tax Court cases. Petitioner submits that the above cited Tax Court cases should be examined very closely since they are constructions of Section 382 by the Court which Congress has established as the expert in the area of Federal taxation. Considerable deference should be paid to its views in construing Section 382. No deference was paid to its views by the Court of Appeals.

5. The question presented, number five, is important for the reason that it also presents an important question of Federal law which has not been, but should be settled by this Court. In addition, it is important for the reason that the construction placed on the regulation by the Court of Appeals, if correctly reflecting the intent of the Commissioner, would lead to no other conclusion but that the regulation is invalid. Settlement of the question by this Court is plainly in the public interest, since obviously the Commissioner will make full use of such regulation in all similar cases if the decision is allowed to stand.

The regulation in question is 1.382(a)-1 (h)(6), 26 CFR, Section 1.382 (a)-1 (h)(6) which provides in part as follows:

> "A corporation has not continued to carry on a trade or business substantially the same as that conducted before any increase in the ownership of its stock if the corporation is not carrying on an active trade or business at the time of such increase in ownership. . . ."

In other words, a literal reading of this portion of the regulation is that an inactive corporation apparently is a non-existent trade or business. The literal reading was given to the regulation by the Court of Appeals. Such a construction flies directly in the face of and is a departure from prior case law dealing with the problem of loss carryovers. *Penton* v. *United States*, 259 F. 2d 536 (6th Cir., 1958). By reason of such departure, petitioner submits that the regulation cannot be applied retroactively to affect petitioner, even if it be valid. *Commissioner* v. *Goodwyn Crockery Company*, 315 F. 2d 110 (6th Cir., 1963); *Fribourg Navigation Company, Inc.* v. *Commissioner*, ... US ....., 15 L. Ed. 2d 751 (1966). The sale which is the subject of this action occurred in 1955. As the Court of Appeals points out, the Commissioner's regulation was promulgated in 1962.

The Court of Appeals further stated that a 1958 Revenue Ruling, 58-9, 1958-1 Cum. Bull., p. 190, gave the taxpayer a warning of things to come. It is apparent that this Revenue Ruling was adopted some three years after the sale which is the subject of this action. The petitioner submits that it is unjust to the point of confiscation for a regulation to substantially depart from previously existing interpretations of the law and then to retroactively apply those regulations to business transactions which have been consummated in past years based on the then existing interpretation of the law.

Petitioner submits that if Congress had intended to impose an active business requirement in Section 382(a) it would have done so specifically, as it did in Section 355(b). Petitioner has examined the legislative history of Section 382 and can find no support for such a requirement in such history.

6. The question presented, number six, is also important by reason of the fact that it raises an important question of Federal law which has not been, but should be settled by this Court. Although the Court of Appeals purported not to pass on the question as to whether or not Oronogo continued substantially the same trade or business after it was acquired by petitioner, the Court nevertheless stated: "The facts clearly indicate no business was ever resumed prior to liquidation." (Appendix B-1, *infra*, page A25).

The record completely refutes this assertion, as shown by the statement contained in this Petition for Certiorari. Substantially the same activity was continued by Oronogo after its acquisition by petitioner. Although the statement by the Court of Appeals in this regard might be labeled as "dictum" this Court can rest assured that the Internal Revenue Service and the Justice Department will make

full use of the statement made by the Court in regard to whether or not the same business was continued after the acquisition. This being the case, the petitioner submits that it is essential that this Court correct the erroneous statement made by the Court of Appeals. The statement by the Court constitutes a ruling as a matter of law on this issue rather than a dictum.

Settlement of the question by this Court is plainly in the public interest, since it is most likely to be presented in many other Section 382 cases.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Internal Revenue Code of 1954:

26 U.S.C. Sec. 382

"SEC. 382. SPECIAL LIMITATIONS ON NET OPERATING LOSS CARRYOVERS.

(a) Purchase of a Corporation and Change in its Trade or Business.—

(1) In General—if, at the end of a taxable year of a corporation—

(A) any one or more of those persons described in paragraph (2) own a percentage of the total fair market value of the outstanding stock of such corporation which is at least 50 percentage points more than such person or persons owned at—

(i) the beginning of such taxable year, or

(ii) the beginning of the prior taxable year,

(B) the increase in percentage points at the end of such taxable year is attributable to—

(i) a purchase by such person or persons of such stock, the stock of another corporation owning stock in such corporation, or an interest in a partnership or trust owning stock in such corporation, or

(ii) a decrease in the amount of such stock outstanding or the amount of stock outstanding of another corporation owning stock in such corporation, except a decrease resulting from a redemption to pay death taxes to which section 303 applies, and

(C) such corporation has not continued to carry on a trade or business substantially the same as that conducted before any change in the percentage ownership of the fair market value of such stock,

the net operating loss carryovers, if any, from prior taxable years of such corporation to such taxable year and subsequent taxable years shall not be included in the net operating loss deduction for such taxable year and subsequent taxable years.

(2) Description of Person or Persons.—The person or persons referred to in paragraph (1) shall be the 10 persons (or such lesser number as there are persons owning the outstanding stock at the end of such taxable year) who own the greatest percentage of the fair market value of such stock at the end of such taxable year; except that, if any other person owns the same percentage of such stock at such time as is owned by one of the 10 persons, such person shall also be included. If any of the persons are so related that such stock owned by one is attributed to the other under the rules specified in paragraph (3), such persons shall be considered as only one person solely for the purpose of selecting the 10 persons (more or less) who own the greatest percentage of the fair market value of such outstanding stock.

(3) Attribution of Ownership.—Section 318 (relating to constructive ownership of stock) shall apply in determining the ownership of stock, except that section 318(a)(2)(C) shall be applied without regard to the 50 percent limitation contained therein.

(4) Definition of Purchase.—For purposes of this subsection, the term 'purchase' means the acquisition of stock, the basis of which is determined solely by reference to its cost to the holder thereof, in a transaction from a person or persons other than the person or persons the ownership of whose stock would be attributed to the holder by application of paragraph (3)."

* * *

Rules of Civil Procedure

28 U.S.C., Rule 50

Rule 50. Motion for a Directed Verdict

(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

28 U.S.C.A. § 2402

§2402. Jury trial in actions against United States

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury. June 25, 1948, c. 646, 62 Stat. 971; July 30, 1954, c. 648, § 2(a), 68 Stat. 589.

REGULATIONS INVOLVED

United States Treasury Regulations

SEC. 1.382(a)-1. *Purchase of a corporation and change in its trade or business.*

* * *

(h) *Change in trade or business.* (1) The provisions of section 382(a) are applicable only if the loss corporation has not continued to carry on a trade or business substantially the same as that conducted before any increase in stock ownership which is taken into account in determining under paragraph (d) of this section whether a change of ownership has occurred. The change in trade or business may occur at any time on or after the date of the earliest such increase during the period beginning on the first day of the loss corporation's prior taxable year. For example, assume that on December 31, 1958 (the end of the corporation's taxable year), the following shareholders own a percentage of the fair market value of the outstanding stock which is greater than each owned at the beginning of the corporation's prior taxable year (January 1, 1957) and that all increases are attributable to purchases within the meaning of paragraph (e) of this section. The increase

in percentage points and the date of purchase is shown for each such shareholder:

Shareholder	Increase	Date of Purchase
	Percent	
A	20	Sept. 15, 1958
B	20	June 15, 1958
C	10	Mar. 15, 1958
D	10	June 15, 1957

Since there have been increases in stock ownership which aggregate at least 50 percentage points, section 382(a) is applicable if the corporation has not continued to carry on a trade or business substantially the same as that conducted *immediately before* June 15, 1957, the date on which the first purchase occurred during the 2-year period. (Emphasis supplied).

* * *

(6) A corporation has not continued to carry on a trade or business substantially the same as that conducted before any increase in the ownership of its stock if the corporation is not carrying on an active trade or business at the time of such increase in ownership. Thus, if the corporation is inactive at the time of such an increase and subsequently is reactivated in the same line of business as that originally conducted, the corporation has not continued to carry on a trade or business substantially the same as that conducted before such increase in stock ownership. This subparagraph may be illustrated by the following examples:

Example (1). X Corporation is engaged in the business of manufacturing and selling machinery. On January 1, 1958, the corporation suspends its manufacturing activities and begins to reduce its inventory of finished

products because of general adverse business conditions and lack of profits. During the period between January 1 and September 1, 1958, the business of the corporation remains dormant. On September 1, 1958, A, an individual, purchases at least 50 percent in value of X Corporation's outstanding stock. On October 1, 1958, the corporation begins to manufacture the same type of machinery it manufactured before January 1, 1958. The reactivation of the corporation in the same line of business as that conducted before January 1, 1958, does not constitute the carrying on of a trade or business substantially the same as that conducted before the increase in stock ownership.

Example (2). Y Corporation is engaged in the business of manufacturing machinery. On January 1, 1958, the corporation suspends its manufacturing activities because of a fire which disrupts the operation of its plant. During the period between January 1 and June 1, 1958, substantial efforts are made to reactivate the business of the corporation by reconstructing the damaged plant. On June 1, 1958, A, an individual, purchases at least 50 percent in value of Y Corporation's outstanding stock. On July 1, 1958, the corporation resumes its normal manufacturing activities. The fact that the corporation's normal activities are temporarily suspended at the time of the increase in ownership does not of itself constitute a failure to carry on a trade or business substantially the same as that conducted before the increase in stock ownership.

* * *

(8) If, after an increase in ownership, the corporation continues to carry on its prior business activities substantially undiminished, the addition by the corporation of a new trade or business does not constitute a failure to carry on substantially the same trade or business. This subparagraph may be illustrated by the following example:

Example. X Corporation, a calendar-year taxpayer, is engaged in the manufacture and sale of electrical appliances and has sustained substantial net operating losses. On June 30, 1958, Y Corporation purchases 100 percent of X Corporation's outstanding stock. During 1959, X Corporation continues substantially undiminished its activities in the manufacture and sale of electrical appliances and also diversifies its activities by acquiring a cement manufacturing plant. The addition of the cement manufacturing business by X Corporation does not of itself constitute a failure to carry on substantially the same trade or business even though net operating loss carryovers attributable to the electrical appliance business are used to offset profits of the cement manufacturing business. See, however, section 269 and the regulations thereunder.

(26 C.F.R., Sec. 1.382(a)-1).

APPENDIX B-1

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM, 1966

UNITED STATES OF AMERICA,
Appellant,

vs.

FENIX and SCISSON, INC., a corporation,
Appellee.

Number 8135

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(Filed in the United States Court of Appeals, Tenth Circuit, May 12, 1966. Robert B. Cartwright, Clerk.)

Robert A. Bernstein, Attorney, Dept. of Justice, (C. Moxley Featherston, Acting Assistant Attorney General, Lee A. Jackson, Attorney, Dept. of Justice, Gilbert E. Andrews, Attorney, Dept. of Justice, John M. Imel, Jr., United States Attorney, and Sam E. Taylor, Assistant United States Attorney, on the brief) for Appellant;

J. Glenn Hahn (Joseph A. Hoskins, Walter J. Kennedy and Hoskins, King, Springer and McGannon on the brief for Appellee.

Before PICKETT, HILL and SETH, United States Circuit Judges.

HILL, Circuit Judge.

Taxpayer corporation instituted this suit in the court below seeking a refund of $40,618.90 of income taxes paid

for the fiscal year ending October 31, 1958. From a jury verdict based upon interrogatories, the trial court granted judgment for the taxpayer. The government's motion for judgment notwithstanding the verdict and alternatively for a new trial was denied and this appeal was taken.

While the complaint sought to reinstate several deductions previously disallowed by the Commissioner, the only matter for review is whether taxpayer is entitled to deduct certain net operating loss carryovers incurred by its wholly owned subsidiary, Oronogo Mutual Mining Company (hereafter called Oronogo).

The taxpayer, Fenix and Scisson, Inc., is an Oklahoma corporation which during all the time in question engaged in heavy construction activity, particularily excavation of underground caverns for the storage of propane and butane gas. It has also conducted some mineral exploration. On October 14, 1955, it purchased all of Oronogo's stock and thereafter maintained it as a subsidiary until October 31, 1957, when Oronogo was liquidated in accordance with § 332 of the 1954 Internal Revenue Code, 26 U.S.C., and its assets merged into taxpayer. In its return for the fiscal year ending October 31, 1958, the taxpayer, relying on § 381(a)(1) and (c)(1),[1] deducted net operating loss carry-

1. Section 381(a)(1) provides in pertinent part:

"(a) General Rule.—In the case of the acquisition of assets of a corporation by another corporation—

(1) in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies, except in a case in which the basis of the assets distributed is determined under section 334(b)(2); or

* * * *

the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution or transfer, the items described in subsection (c) of the distributor or transferor corporation, subject to the conditions and limitations specified in subsections (b) and (c)."

Subsection (c)(1) provides certain conditions and limitations on (a)(1) and need not be set forth.

overs incurred by Oronogo in 1953 ($28,222.80), 1954 ($10,441.72), and 1957 ($320.55).

The Commissioner disallowed taxpayer the losses first under § 269 claiming that the principal purpose for taxpayer's acquisition of Oronogo was the evasion of income tax by securing a deduction. The jury, however, found against the Commissioner on this point and no appeal is taken from that determination. The Commissioner's other basis for disallowing the loss carryovers was under § 382 (a).[2] The theory being that Oronogo's net operating losses

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2. Section 382(a)(1) provides:

"(a) Purchase of a Corporation and Change in Its Trade or Business.—

(1) In General.—If, at the end of a taxable year of a corporation—

(A) any one or more of those persons described in paragraph (2) own a percentage of the total fair market value of the outstanding stock of such corporation which is at least 50 percentage points more than such person or persons owned at—

(i) the beginning of such taxable year, or

(ii) the beginning of the prior taxable year,

(B) the increase in percentage points at the end of such taxable year is attributable to—

(i) a purchase by such person or persons of such stock, the stock of another corporation owning stock in such corporation, or an interest in a partnership or trust owning stock in such corporation, or

(ii) a decrease in the amount of such stock outstanding or the amount of stock outstanding of another corporation owning stock in such corporation, except a decrease resulting from a redemption to pay death taxes to which section 303 applies, and

(C) such corporation has not continued to carry on a trade or business substantially the same as that conducted before any change in the percentage ownership of the fair market value of such stock, the net operating loss carryovers, if any, from prior taxable years of such corporation to such taxable year and subsequent taxable years shall not be included in the net operating loss deduction for such taxable year and subsequent taxable years."

did not survive its stock acquisition by taxpayer in 1955 because Oronogo did not continue to carry on a trade or business after its acquisition which was substantially the same as it carried on before such acquisition.[3] Thus Oronogo did not have these losses available when it was liquidated by taxpayer.

The principal factual issue litigated below may be stated as follows: Was Oronogo engaged in a trade or business at the time of its acquisition by taxpayer on October 14, 1955, and did it continue to carry on substantially the same trade or business thereafter as it conducted prior to the acquisition. An interrogatory stating a similar question was submitted to the jury and it answered the question in the affirmative. Whether this finding by the jury can be supported by *any* substantial evidence is the question to decide; the government contending the evidence was insufficient as a matter of law to sustain the verdict.

In reviewing the record, we are mindful that the jury verdict must not be preempted unless it has no basis in fact. Insufficiency of the evidence is a ground for directing a verdict or granting a new trial, Montgomery Ward & Co. v. Duncan, 311 U.S. 243, and see Vol. 2B Barron and Holtzoff, § 1075. But, as we said in United States v. Hess, 10th Cir., 341 F.2d 444, "* * * to be insufficient to support a verdict, the evidence must all be one way from which only one reasonable inference can be drawn." In this regard, the evidence must be viewed in a light most favorable to the party against whom a motion is made and he must be given the benefit of all inferences fairly

3. The 1957 loss would appear to be available to taxpayer under § 381(a)(1) notwithstanding the provisions of § 382 since it was incurred after the stock acquisition.

drawn therefrom. Commercial Standard Insurance Co. v. Feaster, 10th Cir., 259 F.2d 210.

With these principles in mind, we will review the facts. Oronogo was a Missouri mining corporation engaged in the mining of lead and zinc principally in Southwest Missouri. Prior to its acquisition by the taxpayer in 1955, its stock was owned by Guy and Georgia Waring and their daughter, who was the wife of G. J. Fenix, a principal stockholder of the taxpayer corporation. From the time of its inception in 1936 until some time around 1948 and 1949, Oronogo mined lead and zinc in the so-called Oronogo mining district near Joplin, Missouri. Additionally, it conducted a coal mining operation near Bates, Arkansas, at least until 1951. While Oronogo performed the mining operation, the land it mined was leased to Guy and Georgia Waring. Although the company may have been initially profitable, poor economic conditions in the lead and zinc mining industry after World War II precipitated by a declining market price forced Oronogo to curtail much of its former activity. But Oronogo was not alone; expert testimony revealed that most of the mining in the area was suspended around 1947 and 1948. Shortly after this, in no event later than 1950, the mines in the district including the mines of Oronogo were allowed to fill with water and the evidence conclusively bears out that the water was never removed from the mines.

Shortly after World War II, Oronogo's profit and loss situation reflected consistent annual net operating losses

which continued until its purchase by taxpayer.[4] 1949 was the last year Oronogo had any substantial ore sales. Of the $67,936 gross receipts in that year, ore sales accounted for about $50,000 and gravel sales for the balance. The tax return listed ore mining as the company's principal business. In 1950, ore sales slipped to only $167.04 and gravel sales rose to $27,291.64. The return that year showed ore mining and quarry as the principal business. Ore sales in 1951 were only $56.08 and gravel sales were about $30,000. 1951 was the last tax year Oronogo reported ore sales. The nature of the gross receipts in 1952 is not known. In 1953, only sale of gravel and chat was reported which totalled $33,662.44. One significant factor occurred in 1953. Whereas prior returns reflected the nature of the company business as ore mining and quarry, the 1953 return dropped ore mining and only listed operation of a gravel quarry.

The 1954 return again listed the principal business activity as operating a gravel quarry. Gross income consisted of $3,154.00 of equipment sales and slightly over $4,000 of income derived from equipment rental, scrap sales, and

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4. Oronogo's federal income tax returns for its taxable years beginning in 1947 and ending in 1955 reflect the following net operating losses.

1947	$31,604.65
1948	86,330.78
1949	80,891.22
1950	22,256.47
1951	23,469.48
1952	22,574.97
1953	28,222.80
1954	10,441.73
1955	6,917.41

While the 1955 return originally showed the loss above, an amended return reported taxable income of $18,455.20 from equipment sales. This was offset by a net operating loss carryover from 1950.

interest earned. The 1955 return showed income of $4,315.00 for sale of scrap and miscellaneous receipts of $2,060.33. Subsequently, an amended return was filed for the year showing net gains on sale of assets of $25,402.61 and a taxable income for the year of $18,485.20. The 1950 net operating loss was then carried over the year to offset the gain. In 1956, Oronogo changed its accounting period to a fiscal year ending October 31 to coincide with the fiscal year of taxpayer. Oronogo's return for this ten month period shows taxable income of $33,596.09 based solely on equipment sales and rentals, completely offset by carry-over losses from 1951-1952. The return for 1957 was Oronogo's final corporate return since it was liquidated in the year. It reported $2,953.14 on sale of supplies, rental income of $13,419 and a loss on an asset sale of $1,980.66, making a gross of $14,391.48 with expenses of $14,712.03, leaving another net loss of $320.55.

While Oronogo's tax returns give some idea of its activities; they by no means tell the whole story. Apparently in May, of 1952, Mr. Waring, acting for Oronogo, engaged General Steel Products Company to sell a substantial part of Oronogo's assets including the equipment used in the coal mining operation in Bates, Arkansas. Mr. Kirk of General Steel Products Company testified that he was authorized to sell between eighty and ninety per cent of Oronogo's assets but that he was only successful in selling about ten per cent. He did relate however that the company trucks were not listed with him. Another factor regarding Oronogo's equipment bears mentioning. During the time after 1951, much of the equipment was located on property belonging to the American Zinc Lead and Smelting Company which had leased land in the mining district.

On August 12, 1953, the minutes of Oronogo's board of directors reveal a resolution to dissolve the company.[5] The directors then resolved that the company be dissolved, that the remaining assets be liquidated, and that the company transact no further business except to wind up its affairs. On September 25, 1953, articles of dissolution were filed with the State of Missouri.

Sometime in early 1955, the Potter and Sims Mining Company which had leased land adjoining the leases owned by Guy Waring, attempted to purchase the leases and Oronogo's remaining equipment, with a view toward resuming mining activity in the area. Potter and Sims offered $50,000 for Oronogo's stock and leases plus the usual royalty and overriding royalty. Apparently the main reason Potter and Sims Company wanted the Waring leases was to enable them to pump all the water out of the area prior to mining. The nature of the underground water in the mines is such that one cannot de-water his mine without also de-watering the land of his neighbor, and Potter and Sims Company wanted to make sure they could mine all the area they de-watered. Expert testimony did opine that had the water been removed, profitable mining operations could have resumed. The testimony seemed to be that it would take from sixty to one hundred twenty days to de-water the area at a cost of approximately $64,000.

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5. The resolution read in pertinent part:

"Whereas, Earl Toutz and William Snapp have recently purchased the Company's sand and gravel plants located on the American Zinc Lead and Smelting Company's chat pile on the Frisco Tracks near Oronogo, together with the machinery, equipment and supplies used in connection therewith and

"Whereas, the Company has disposed of its last business operation, and there appears to be no further reason for the continuance of the corporate business and/or existence; * * *."

On October 14, 1955, the stockholders of Oronogo sold their stock to the taxpayer for $30,000. Three days prior to the stock sale, the directors of Oronogo rescinded the previous dissolution resolution and at a final directors' meeting they authorized Oronogo to redeem a considerable amount of the stock owned by Guy Waring and his wife. Guy Waring and his wife then assigned their leases to G. J. Fenix of the taxpayer corporation.

The facts up to this juncture represent Oronogo's activities prior to its acquisition by the taxpayer corporation. From the standpoint of its tax return for its first fiscal year after becoming a subsidiary of taxpayer, we have seen that its gross income of $33,000 plus was derived exclusively from sales of equipment and equiptment rentals. The rent income was largely from taxpayer. Prior to its acquisition, Oronogo maintained two permanent employees, a mechanic and a bookkeeper. After the stock purchase, Oronogo's books and records were moved to Tulsa, Oklahoma, which is taxpayer's home, and taxpayer's personnel thereafter kept the books. Oronogo had no other employees in Tulsa. Some of Oronogo's remaining equipment was shipped by taxpayer to Alabama in 1956 to be used on taxpayer's construction projects there. In 1957 more of the equipment was shipped to a taxpayer project in New Jersey. The other equipment was removed to Tulsa.

Shortly after the stock purchase in 1955, taxpayer installed an electric water pump in a mine it owned about twelve miles from Oronogo district where Oronogo Company had mined, apparently hoping to de-water the mine and commence operations. However, the pumping ceased after several months and was never resumed and no mining was ever done there. There is also evidence that Potter and Sims Company again tried to purchase Oronogo's

assets and leases this time from taxpayer or to form a joint venture, but their efforts met with no success.

It seems to be undisputed that much of the equipment still possessed by Oronogo at the time of its acquisition would or could be utilized by taxpayer in its excavation operation or construction. However, Mr. Scisson, a principal officer of the taxpayer, testified unequivocally that while taxpayer corporation owned some mining leases during the period in question, it operated no commercial mines. He further stated that Oronogo was not engaged in mining at the time of acquisition, and that the only mining activity in the area after the stock purchase was the previously referred to attempt to de-water a mine owned personally by Mr. Fenix which was terminated because the water was not receding and zinc prices remained depressed. Mr. Scisson further testified that the principal purpose in acquiring taxpayer was to get back into the mining operation and to get Oronogo's equipment. He also admitted knowing of the tax advantage of Oronogo's net operating losses and described Oronogo as a mining company on a stand-by basis.

There was an abundance of testimony in the record elicited from qualified mining engineers both for the taxpayer and the government. One such expert for the taxpayer stated that the lead and zinc mining industry was highly cyclical; that when prices go up, the small operators like Oronogo may resume operations profitably. He further testified that merely because mines are flooded doesn't preclude future operations; however, he cautioned that Oronogo would not have been able to resume operations unless the whole mining area was de-watered which meant they would have to joint venture with other mines to pump the water.

Again somewhat in this light, Leonard Parker, a mining engineer, testified that it is not uncommon in the area when prices are depressed for a company to keep key personnel and retain its equipment in order to resume operations on very short notice, i.e., a week or two weeks, should prices rise. When asked the question, what does a mining company do with its equipment during a period of shut down, he answered, "He leaves it intact, the major portion of his equipment. * * * But, he leaves all of his operating facilities and his key personnel intact. That's the time that they do research and project for future operations."

Mr. Parker was hired by Potter and Sims Mining Company to evaluate some of the land in the mining area including that formerly mined by Oronogo and in his opinion the land could be rehabilitated and operated profitably. He also recalled advising Potter and Sims Company that it could not mine land adjacent to that mined by Oronogo without Oronogo's cooperation in pumping out the water. Apparently it was this advice that prompted Potter and Sims Company to negotiate for the sale of Oronogo.

By its motion for judgment notwithstanding the verdict and assignment of errors, appellant has presented for decision whether or not as a matter of law, Oronogo continued to carry on a trade or business substantially the same as that before its purchase by taxpayer on October 14, 1955. However, appellee taxpayer argues that the government has not preserved this issue for our determination. Specifically, appellee contends that the government has sought to enlarge its motion for directed verdict by its motion for judgment notwithstanding the verdict and that this is improper. Taxpayer states the only issue for review is whether Oronogo's filing of the Articles of Dissolution constituted conclusive evidence that Oronogo was not carrying on a trade or business.

While we agree with the taxpayer that a motion for judgment notwithstanding the verdict may not enlarge or assert new matters not presented in the motion for directed verdict,[6] we believe the motion for directed verdict was sufficient to encompass the position now maintained. At the close of all of the evidence, the government moved for a directed verdict, "on each issue in this case". Stating further, the government feels that the failure to carry on a trade or business is conclusively established by the filing of the Articles of Dissolution. In arguing this motion, government counsel stated in part, "That the filing of the Articles of Dissolution are conclusive as to whether or not this corporation was carrying on a trade or business and that when these Articles of Dissolutinn are taken and the other facts of this case subsequent to the filing date of those Articles of Dissolution, there's no other reason (sic) inference that could be drawn from the facts other than that this corporation was winding up its affairs and we move for a directed verdict on that issue." The motion was denied.

There is no doubt that the government's motion could have been more accurately stated, however, we believe under the circumstances it did present for determination whether Oronogo was engaged in a trade or business or whether it had ceased its activities and was winding up its affairs. Certainly as part of its motion the government laid great stress on the fact that Articles of Dissolution had been filed, but it also relied on the other facts to show the company was not engaged in a trade or business. Technical precision is not necessary in stating grounds for

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6. See Vol. 2B Barron & Holtzoff, § 1079. Notice that Rule 50(b) does not say judgment notwithstanding the verdict but to have judgment entered in accordance with this motion for directed verdict.

the motion so long as the trial court is aware of the movant's position. Virginia-Carolina Tie & Wood Co. v. Dunbar, 4th Cir., 106 F.2d 383. We believe the motion here satisfied that requirement and was sufficient to form a basis for the motion for judgment notwithstanding the verdict. See Lewis v. Nelson, 8th Cir., 277 F.2d 207.

§ 382 disqualifies a net operating loss where three conditions are met: (1) An increase of at least 50-percentage points in the stock ownership of a corporation by a prescribed number of persons within a taxable year beginning after June 22, 1954; (2) the increase in ownership is attributable to purchases of the stock; and (3) the corporation has not continued to carry on a trade or business substantially the same as that conducted before any change in the percentage ownership of the stock. The parties agree the first two conditions are met, it is the third condition with which we must deal. The language trade or business and its substantial continuity is fraught with uncertainty. The legislative history of the section provides little help. See C.I.R. v. Goodwyn Crockery Company, 6th Cir., 315 F.2d 110. We do know the section was enacted to prevent "trafficking in corporations with loss carryovers."[7] § 129 of the 1939 Code, which was the forerunner of § 269 denying loss carryovers where the principal purpose of the acquisition was to evade the payment of tax, had proved ineffective due to the difficulty of proving the state of mind of the parties to the transfer. Congress apparently sought in § 382 a more objective test to determine when and what extent loss carryovers would be allowed. See H. F. Ramsey Co., 43 T.C. 500. But the answer is by no means an easy one.

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7. H. R. Rept. # 1337, 83rd Cong., 2d Sess. 42 (1954). 3 U. S. Code Cong. & Adm. News, p. 4067.

Judicial interpretation of § 382 has ben slow. The cases that have considered a problem similar to our's generally take the position that once a business becomes inactive and is discontinued, a stock purchase followed by a reactivation of the former business will meet the third requirement of § 382 and the loss carryovers will be disallowed. See Glover Packing Company of Texas v. United States, Ct. Cl., 328 F.2d 342; Fawn Fashions, Inc., 41 T.C. 205; and compare H. F. Ramsey, Co., supra. As was said in the Glover case, at page 348, concerning the trade or business continuity requirement, "It hardly envisages the resumption of an operation carried on in the distant past, * * *. Nor does it envisage the resuscitation of a business long since discontinued."

While the Commissioner's regulations were not promulgated until 1962, which was nearly eight years after the statute, § 1.382(a)-1(h)(6) clearly takes the position that a corporation may not carry over operating losses after a stock purchase if it was inactive at the time of the ownership change.[8] This portion of the regulation appears entirely compatible with the statute and has in fact been upheld by the Tax Court in Fawn Fashions, Inc., supra, and the Court of Claims in Glover Packing Company of Texas v. United States, supra.

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8. Treas. Reg. 1.382(a)-1(h)(6) provides:

"A corporation has not continued to carry on a trade or business substantially the same as that conducted before any increase in the ownership of its stock if the corporation is not carrying on an active trade or business at the time of such increase in ownership. Thus, if the corporation is inactive at the time of such an increase and subsequently is reactivated in the same line of business as that originally conducted, the corporation has not continued to carry on a trade or business substantially the same as that conducted before such increase in stock ownership."

Taxpayer argues this regulation is inapplicable because not promulgated until after the liability arose in this case, relying on language by the Sixth Circuit to that effect in C.I.R. v. Goodwyn Crockery, Inc., supra. It is true the Sixth Circuit refused to apply the regulation retroactively but under a circumstance different from this, for in Goodwyn the regulation was not even enacted at the time of the Tax Court decision. In the instant case, the regulations were in effect before the trial but the court specifically declined to instruct on any part of the regulations.

While we by no means rest our decision on this regulation alone, we have no doubt of the Commissioner's authority to make his regulations retroactive which he apparently has done here.[9] At any rate, as early as 1958, the Commissioner issued Revenue Ruling 58-9, 1958, Cum. Bull. 190, which is nearly identical to § 1.382(a)-1(h)(6). Thus, the taxpayer had a warning of things to come.

The question in this case under § 382(a) appears twofold: Was Oronogo engaged in a trade or business prior to the stock transfer and if so was the business substantially carried on thereafter? It seems clear that a corporation could not carry on a trade or business substantially the same as theretofore conducted if the corporation was not engaged in such a trade or business at the time of the requisite change in stock ownership.

What was the trade or business of Oronogo prior to October 14, 1955? By the charter it was created to engage in the lead, zinc and coal mine business. Yet, no actual mining of any kind was performed after 1951. The lead

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9. § 7805(b), 26 U.S.C. provides:

"Retroactivity of Regulations or Rulings.—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." See also Vol. 1, Mertens, § 3.25.

and zinc mines were flooded with water and the coal mine was shut down. Was it engaged in the operation of a gravel quarry and the sale of chat? Apparently it so considered itself when in its 1953 income tax return it listed operation of a gravel quarry as its principal business dropping the word mining altogether. But the gravel quarry and chat business certainly ended in 1953 for no further operation of this nature continued after 1953 and no income from chat sales was reported after 1953. Additionally the Articles of Dissolution filed August 12, 1953, clearly recite that Oronogo had sold its sand and gravel plants together with the equipment, machinery and supplies used in that business.

Taxpayer does point to the fact that during 1955, Oronogo was at least negotiating with Potter and Sims Company for resumption of mining,[10] that it was maintaining its equipment and incurring expenses, viz., insurance, taxes, depreciation and wages for two employees and had income from sales and rentals. Certainly the fact that the company was incurring some fixed expenses and filing tax returns doesn't mean it engaged in a trade or business. The expenses for the most part were to preserve the remaining equipment until it would be disposed of. As for the rentals and equipment sales, we find nowhere an argument made that Oronogo was engaged in the business of equipment sales and rentals. At any rate such an argument would carry little weight for the company was not maintaining an inventory for such purpose by replacing the equipment sold and rented. Furthermore, there is no doubt that at one time it held out between eighty and ninety

10. The negotiation seemed one sided for all we know is that Potter and Sims Company offered to purchase Oronogo's stock and the leases for $50,000 only to later sell its stock for $30,000 to taxpayer.

per cent of its equipment, excluding trucks, for sale to the public. As for rental income, neither the evidence nor the 1955 tax return discloses any rental income in that year.

Finally, taxpayer contends that even though the company was not engaged in extracting minerals in 1955, it was doing what many other mining companies in the area were doing, that is holding itself in readiness to resume operations should the market price of lead and zinc rise. The facts however are inconsistent with this argument. Oronogo's mines as well as the other mines in the area were flooded with water and it would take around $64,000 and from sixty to one hundred and twenty days to alleviate this factor. Keeping a mechanic to look after equipment can hardly be considered maintaining key mining personnel.[11] Nor do we find evidence that the company was exploring the possibility of resuming operations in a new locale. It has sold its chat and sand business in 1953, and although rescinded three days before its stock was purchased, Oronogo's directors approved Articles of Dissolution reciting unequivocally that there appears to be no further reason for continuing the corporate business or existence.

In any event, Oronogo's attempt to sell nearly all of its equipment is incompatible with the idea that it was merely standing by intending to resume operations should business factors improve. Had they been completely successful in selling equipment, they would have been unable to resume operations short of repurchasing necessary equipment. We hardly believe Congress intended § 382(a) to turn on such a fortuitous circumstance. See Euclid Tennessee, Inc., v. C.I.R., 41 T.C. 752.

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11. Apparently Oronogo had from between 100-150 employees until activity was curtailed in 1947-1948.

The evidence in totality leads only one way which is that prior to October 14, 1955, Oronogo was no longer engaged in any trade or business and the jury verdict to the contrary must be set aside as a matter of law. Having reached this result, we need not pass upon the activities of Oronogo after its acquisition by taxpayer although the facts clearly indicate no business was ever resumed prior to liquidation.

The judgment is REVERSED and the case is REMANDED with directions to enter a judgment consistent herewith.

APPENDIX B-2

Judgment

Fortieth Day, March Term, Thursday, May 12th, 1966.

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with directions to enter a judgment consistent with the opinion of this court.

APPENDIX B-3

Order Denying Appellee's Petition for Rehearing

Eighteenth Day, May Term, Wednesday, June 15th, 1966.

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[On June 27, 1966, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the Northern District of Oklahoma.]